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Nos. 73-550, 73-867, 73-868, 73-871, 73-872, 73-874

In the Supreme Court of the United States

OCTOBER TERM, 1973

TEXASGULF INC., ET AL., PETITIONERS

v.

FEDERAL POWER COMMISSION

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (LPL App. A7-A31)[1] is reported at 483 F. 2d 623. The Federal Power Commission's initial opinion (No. 610, LPL App. A35-A76) and its opinion denying rehearing (No. 610-A, LPL App. A77-A85) are reported at 47 FPC 245 and 47 FPC 1021, respectively.

[1] "LPL App." refers to the appendix to Louisiana Power & Light Company's petition for a writ of certiorari, No. 73-867.

JURISDICTION

The judgment of the court of appeals was entered on June 28, 1973. Petitions for rehearing were denied on September 5, 1973. The petition for a writ of certiorari in No. 73-550 was filed on September 26, 1973, and each of the other petitions was filed on December 4, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTIONS PRESENTED

1. Whether the Federal Power Commission has jurisdiction under Section 1(b) of the Natural Gas Act, 15 U.S.C. 717(b), over a previously nonjurisdictional intrastate pipeline facility which now receives and transports substantial volumes of gas diverted from certificated interstate facilities.

2. Whether a pipeline facility is exempt from the Commission's jurisdiction pursuant to Section 1(c) of the Act, as amended, 15 U.S.C. 717(c), where the certificated interstate gas supplies received by that facility are not received "from another person" but only from another branch of the same company's integrated pipeline network, and where the services provided by the facility are not "subject to regulation by a State commission."

STATUTE INVOLVED

Section 1 of the Natural Gas Act, 52 Stat. 821, as amended, 15 U.S.C. 717, provides in pertinent part:

> (b) The provisions of this Act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, indus-

trial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

(c) The provisions of this Act shall not apply to any person engaged in or legally authorized to engage in the transportation in interstate commerce or the sale in interstate commerce for resale, of natural gas received by such person from another person within or at the boundary of a State if all the natural gas so received is ultimately consumed within such State, or to any facilities used by such person for such transportation or sale, provided that the rates and service of such person and facilities be subject to regulation by a State commission. The matters exempted from the provisions of this Act by this subsection are hereby declared to be matters primarily of local concern and subject to regulation by the several States. A certification from such State commission to the Federal Power Commission that such State commission has regulatory jurisdiction over rates and service of such person and facilities and is exercising such jurisdiction shall constitute conclusive evidence of such regulatory power or jurisdiction.

STATEMENT

The issue in this case is whether the Federal Power Commission has regulatory jurisdiction over two portions of the pipeline system of United Gas Pipe Line Company (United)—known as the Green

System East and the Purple System—which are located entirely within the State of Louisiana and which have previously been operated by United as separate intrastate pipelines outside the Commission's jurisdiction. The Commission concluded, and the court of appeals upheld the conclusion, that the two systems have in fact become integrated parts of United's interstate system and are therefore subject to Commission jurisdiction under the Natural Gas Act.[2]

A. PROCEEDINGS BEFORE THE COMMISSION

On October 1, 1970, United filed an application with the Commission seeking a certificate of public convenience and necessity under Section 7(c) of the Act, 15 U.S.C. 717f(c), authorizing the continued operation of its Green and Purple Systems. After a hearing, the Commission ruled that United's introduction of "substantial quantities" of certificated interstate gas supplies into these previously intrastate,

[2] The status of the Green System East has been before the courts on a prior occasion. In 1971, after the instant proceeding had been initiated by United, Louisiana Power and Light Company, a petitioner here, sought a determination of the intrastate character of the Green System in the United States District Court for the Western District of Louisiana. That court dismissed the suit on the ground that the question was within the primary jurisdiction of the Commission. *Louisiana Power and Light Co.* v. *United Gas Pipe Line Co.*, 332 F. Supp. 692. On appeal, the court of appeals reversed, holding that the Commission does not have jurisdiction over the Green System because the injection of interstate gas into the system is minimal and irregular (456 F. 2d 326, 339). This Court reversed the judgment of the court of appeals, agreeing with the district court that the issue should have been decided first by the Commission. *Federal Power Commission* v. *Louisiana Power and Light Co.*, 406 U.S. 621.

uncertificated facilities caused a sufficient "commingling" of intrastate and interstate gas to subject the operation of both the Green and the Purple Systems, and all sales and services from those systems, to the Commission's jurisdiction (LPL App. A44–A45, A69–A70).

The Commission rested its conclusion on evidence showing that interstate gas enters the two systems at several points of interconnection with certificated facilities (*id.* at A41–A44) and that United would not be able to meet its peak-day and annual delivery requirements without these supplies of interstate gas (*id.* at A45–A47). Though the Commission stated that even an insubstantial amount of commingling would bring the facilities within its regulatory jurisdiction (*id.* at A50–A53), it found that the quantities involved were in fact "substantial" (*id.* at A44) and "not *de minimis*" (*id.* at A46).[3]

The Commission rejected the claim of several parties that a portion of the Green System is exempt from Commission jurisdiction under Section 1(c) of the Act, 15 U.S.C. 717(c) (LPL App. A52–A56). The

[3] The Commission also found that some gas transported in the Green and Purple Systems is delivered to interstate pipelines for transportation to states other than Louisiana (LPL App. A41–A42, A48–A49). The Commission stated in its opinion denying rehearing, however, that, while some Green System gas "appears to flow out of the state," that fact was not essential to its jurisdictional conclusions. "In noting the flows of gas into Mid-Louisiana Gas Company's interstate pipeline it was not our purpose to trace the flows of particular molecules of gas to any given point, but merely to recognize that gas originating in the Green System-East is ultimately commingled with interstate flows" (*id.* at A78).

exemption applies to any person who would otherwise be subject to the Commission's jurisdiction and who is engaged in the transportation or sale for resale "of natural gas received by such person from another person within or at the boundary of a State if all the natural gas so received is ultimately consumed within such State, * * * provided that the rates and service of such person * * * be subject to regulation by a State commission." The Commission found that United's Green System is not exempt because (1) the Louisiana Public Service Commission is barred by the state constitution from regulating any aspect of a pipeline's sales of natural gas directly to industrial consumers (LPL App. A53–A54),[4] and (2) the Green System receives the interstate gas from United's own certificated interstate facilities and not, as the Act requires, "from another person" (*id.* at A53–A54, A56).

Having determined that it has jurisdiction over United's Green and Purple Systems, the Commission considered United's application for a certificate of

[4] Though the Federal Power Commission does not directly regulate the rates charged to direct industrial customers, it regulates other aspects of such direct service. Deliveries to direct customers may be made only pursuant to a certificate of public convenience and necessity issued by the Commission under Section 7(c) of the Act, 15 U.S.C. 717f(c), and a pipeline may not abandon its service to direct customers without the Commission's prior permission and approval under Section 7(b) of the Act, 15 U.S.C. 717f(b). As the Commission stated, "[t]he price at which the direct industrial sale is made is * * * material in both certificate and abandonment proceedings" (LPL App. A55). It follows that "the exercise of jurisdiction by this Commission over the Green System-East would provide regulation related to certain direct service where none is presently undertaken by the State" (*ibid.*).

public convenience and necessity with respect to those facilities (*id.* at A59–A65). If found that "the evidence in the record is insufficient to permit a determination of whether the certificate sought by United is required by the public convenience and necessity" (*id.* at A64–A65), and it accordingly remanded the case to the Presiding Examiner for additional evidentiary proceedings (*id.* at A65, A70).[5]

The Commission thereafter denied applications for rehearing (*id.* at A77–A85).

B. THE DECISION BELOW

The court of appeals affirmed the Commission's orders (*id.* at A7–A31). It accepted the Commission's evidentiary findings concerning the amounts of interstate gas introduced into the Green and Purple Systems (*id.* at A19–A21, A30). Giving due deference to the Commission's judgment "on an issue where that body's initimate knowledge of the specific problems is concerned" (*id.* at A23), the court declined to set aside the Commission's determination that "the injections of gas of an interstate character are not minimal and irregular, but are indeed substantial, fairly constant, likely to continue in volume, and necessary to meet contractual commitments" (*id.* at A22). It accordingly

[5] The Commission subsequently issued certificates of public convenience and necessity for the Green and Purple Systems (Opinions No. 661 and No. 661–A, issued July 20, 1973, and September 14, 1973). Petitions to review that action of the Commission were filed in the Court of Appeals for the District of Columbia Circuit and are pending *sub nom. State of Louisiana, et al.* v. *Federal Power Commission*, Nos. 73–1994, 73–2004, 73–2146.

held that the Commission correctly asserted jurisdiction over United's facilities pursuant to Section 1(b) of the Act (*id.* at A24, A29–A31).[6]

The court also sustained the Commission's determination that United's facilities are not exempt under Section 1(c) of the Act (*id.* at A24–A29). It reviewed the legislative history of the 1954 amendment adding Section 1(c) to the Act (the "Hinshaw Amendment") and concluded that "Congress did not intend the amendment to relieve the Commission of jurisdiction over local branches of integrated interstate systems" (*id.* at A25). That, the court stated, is why the amendment limits exemptions to persons who receive gas "from another person": "[T]he requirement of a 'person-to-person' exchange at the point of receipt ensures that the statutory exemption will not extend to local branches of a single interstate system, all of which is operated by the same 'person' " (*id.* at A27).

The court held that United's Green System "has ceased to be an intrastate facility and has become, instead, a local branch of an integrated pipeline"

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[6] The court thus found it unnecessary to consider whether "one molecule [of interstate gas] would be sufficient to automatically confer federal control" (LPL App. A23). This Court has held that the Commission's jurisdiction over the transmission of electrical energy in interstate commerce, pursuant to the analogous provisions of the Federal Power Act (16 U.S.C. 824(b)), attaches "no matter how small the quantity" of power that flows in interstate commerce, "because it is settled that Congress has not 'conditioned the jurisdiction of the Commission upon any particular volume or proportion of interstate energy involved, and we do not . . . supply such a jurisdictional limitation by construction.' *Connecticut Light & Power Co.* v. *FPC*, 324 U.S. 515, 536." *Federal Power Commission* v. *Florida Power & Light Co.*, 404 U.S. 453, 461, n. 10.

(*ibid*). With respect to that system, the "other person" requirement is not satisfied. The court stated (*id.* at A28):

> At the points of connection between the Black System and the Green, United is the only person who gives gas, and United is the only person who receives. At those points—the points at which the exemption must take effect, if at all—the "person-to-person" requirement simply is not met.

The Purple System is also "part of an integrated pipeline network involving significant transportation of interstate volumes" (*id.* at A31). As with the Green System, "[s]ignificant volumes of gas from interstate facilities are introduced into the Purple System for local sale" (*id.* at A30). In addition, even if the gas were received "from another person," it could not be said that "all the natural gas so received is ultimately consumed within" Louisiana (Section 1(c), 15 U.S.C. 717(c)). As the court stated (LPL App. A30) in upholding the Commission's findings (*id.* at A41–A42), "[g]as clearly flows out of this system for interstate markets * * *."

ARGUMENT

The decision of the court of appeals is correct, and there is no need for further review.

1. Only three petitioners challenge the court's holding that United's facilities are within the Commission's jurisdiction under Section 1(b) of the Act.

a. No petitioner directly attacks the evidentiary findings upon which the Commission rested its jurisdic-

tional determination. Two parties argue (LPL 7, 9–10; LA 7–8),[7] however, that the Commission improperly relied on "officially noticed facts concerning United's peak day flows" (LA 7).

The extra-record data of which petitioners complain, and to which Commissioner Carver referred in his dissenting opinion (LPL App. A83–A84), consists of two "flow diagrams" filed by United pursuant to the Commission's reporting requirements for pipelines (18 C.F.R. 260.8). The diagrams show the amount of interstate gas introduced into United's Green and Purple Systems on March 3, 1971, the peak delivery day of the 1970–1971 winter heating season. Similar diagrams for January 6, 1970 (the peak day of the 1969–1970 winter heating season) and for the 12-month period ending December 31, 1969, were part of the record in the case (see LPL App. A40).

While the Commission took official notice of the two diagrams and referred to the facts they reflect about the peak day of March 3, 1971 (see *id.* at A41–A44), that information was cumulative of the unchallenged facts in evidence with respect to annual flows for 1969 and peak day flows on January 6, 1970. No finding rests solely on the challenged flow diagrams, and the Commission's opinion suggests that the diagrams were not even an essential underpinning of any find-

[7] We use the following abbreviations to signify the six petitions: "TG" (Texasgulf Inc., No. 73–550); "LPL" (Louisiana Power & Light Co., *et al.*, No. 73–867); "LGS" (Louisiana Gas Service Co., *et al.*, No. 73–868); "EX" (Exxon Corp. and Texaco Inc., No. 73–871); "LA" (State of Louisiana, *et al.*, No. 73–872); "NO" (New Orleans Public Service Inc., No. 73–874).

ing. It states that "[t]he peak-day flow diagrams filed by United pursuant to Section 260.8 of the Commission's Regulations *as well as* the flow diagrams in the record of this case reveal the flow of interstate gas into United's uncertificated facilities" (*id.* at A47).

The court of appeals apparently was satisfied that the annual 1969 and peak-day 1970 diagrams by themselves fully supported the Commission's findings. In sustaining those findings it did not refer to the challenged diagrams from peak-day 1971 (see *id.* at A19–A21, A30), nor did it explicitly address the contention that those diagrams were improperly noticed by the Commission.

In these circumstances, where the Commission's reference to extra-record facts was cumulative and corroborative of substantial evidence already in the record, any error with respect to official notice is harmless and does not require review by this Court.

b. Louisiana Power argues (LPL 7, 10–11) that the court of appeals erroneously applied a "rational basis" test rather than a "substantial evidence" test in upholding the Commission's jurisdictional determination. But it is clear from the court's opinion that it found substantial evidence to support each of the Commission's evidentiary findings concerning the amounts of interstate gas introduced into the Green and Purple Systems. It properly applied a "reasonable basis" standard only in reviewing and upholding the Commission's *judgment* that those amounts are substantial and that the two systems are part of an integrated interstate pipeline system. See 4 Davis, *Administrative Law Treatise*, § 30.05 (1958); *Ameri-*

can Smelting and Refining Co., et al. v. *Federal Power Commission* (C.A.D.C., Nos. 72–2204, *et al.*, decided January 21, 1974), slip op. 32–33.

c. It follows from this Court's decisions in *California* v. *Lo-Vaca Gathering Co.*, 379 U.S. 366, and *Federal Power Commission* v. *Amerada Petroleum Co.*, 379 U.S. 687, that the Commission has jurisdiction over the Green and Purplé Systems. Those cases hold that, where interstate gas is commingled with intrastate gas in a pipeline facility, the operation of that facility and the sales and service rendered by means of the facility are subject to the Commission's jurisdiction. See *Louisiana Public Service Commission* v. *Federal Power Commission*, 359 F. 2d 525 (C.A. 5), certiorari denied, 385 U.S. 833.

Petitioners argue (LPL 7–8; LA 14–15; NO 8) that *Lo-Vaca* and *Amerada* are distinguishable, because in those cases the "channel of the constant flow" (379 U.S. at 369) of the gas was interstate whereas here the channel in the Green System East is entirely intrastate. But the relevant "channel of the constant flow" in this case is not that of the Green System East but rather that of the interstate pipeline facility from which substantial quantities of gas are taken for introduction into the Green System East. What matters for jurisdictional purposes is whether the gas thus introduced is interstate gas, and that in turn depends on whether it has been diverted from an interstate channel of constant flow.

Lo-Vaca and *Amerada* hold that gas produced and sold within the same state is nevertheless sold "in interstate commerce" if it has been diverted from a

pipeline facility carrying gas destined for out-of-state delivery. No party contends that the gas introduced into the Green System East is not diverted from precisely such an interstate channel. It is therefore immaterial that the diverted gas itself may never have left the State of Louisiana.[8]

2. All the petitioners argue that the Green System is nevertheless exempt from Commission jurisdiction under the Hinshaw Amendment, Section 1(c) of the Act, 15 U.S.C. 717(c). Louisiana argues (LA 21–22) that the Purple System is also exempt.

a. Petitioners claim (TG 10; LGS 8–9; LA 20) that Section 1(c)'s requirement that the interstate gas be received "from another person" need not be satisfied precisely at the point of interconnection between an interstate facility and an allegedly exempt facility. The court of appeals correctly rejected that argument. As the legislative history shows (LPL App. A 26), the Hinshaw Amendment was not designed to exempt "local branches of integrated interstate systems" (*id.* at A 25). The "requirement of a 'person-to-person' exchange at the point of receipt ensures that the statutory exemption will not extend to local

[8] It is also immaterial whether, as some petitioners allege, United contrived to bring its Green and Purple Systems within federal jurisdiction, or whether, as the Commission found (LPL App. A56), the introduction of interstate gas was necessary to permit United to meet its delivery requirements from the Green and Purple Systems. As the Commission correctly concluded, under the Natural Gas Act motive is not a relevant jurisdictional consideration. "[T]he jurisdictional facts of interstate transportation and sale of gas exist; the motives that brought them about are not material to our determination" (*ibid.*).

branches of a single interstate system, all of which is operated by the same 'person'" (*id.* at A 27).[9]

[9] Petitioners claim (TG 10; LGS 9; EX 9–10; NO 6–7) that the Commission's prior decisions are inconsistent with its present view of the "from another person" requirement. The cases they cite, however, are distinguishable. In *United Gas Pipe Line Co.*, 35 FPC 172, and *Columbia Gas of West Virginia, Inc.*, 44 FPC 1260, the Commission's orders make clear that the exempt facilities purchased all their gas from other companies. In *Mountain Gas Co.*, 42 FPC 305, and *Pennzoil Pipeline Co.*, 44 FPC 291, the exempt facilities obtained all their *interstate* gas from other companies. Although they also used gas produced within the State by the companies themselves, there is no indication that the locally produced gas was diverted from any interstate facilities of the companies. *Michigan Consolidated Gas Co.*, 46 FPC 658, is inapposite. The Commission merely ruled in that case that an existing exemption for a facility purchasing all its gas from other companies would not be lost if the facility implemented a gas exchange agreement with another pipeline within the State.

Utah Gas Service Co., 38 FPC 1219, on rehearing, 39 FPC 388, involved a special situation. The company operating the exempt facility in that case, unlike United in this case, was "engaged principally in the distribution of gas" within the State of Utah and did "not make any sales for resale off the [exempt] Orem-Uintah line" (38 FPC at 1219). The gas for the exempt line was obtained from another company, Cascade Natural Gas Company, and all of that gas was consumed in Utah (*ibid.*). Although there were allegations that the company's interstate facilities were connected with its Orem-Uintah line, it appears from the dissenting opinion of Commissioner Ross (*id.* at 1221) that the gas allegedly flowed out of, rather than into, the Orem-Uintah line, and was thereafter commingled with gas from the company's interstate facilities. In those circumstances, the issue was not whether the gas received by the exempt line was received "from another person"—it clearly was received from Cascade—but rather whether the gas that *left* the system was ultimately consumed in Utah. The Commission found that it was (*id.* at 1219).

Petitioners argue that the person-to-person requirement is satisfied because the gas introduced into the supposedly exempt Green System East was purchased by United from independent producers within Louisiana (TG 10). But that gas is then transported in United's certificated interstate facilities before a portion of it is diverted for introduction into the Green System. Thus, while the person-to-person requirement is satisfied at the point of purchase, the additional requirement that all the gas be "ultimately consumed within" the State cannot be met, because only the portion diverted for the Green System is ultimately consumed within the State. Conversely, while the "ultimately consumed" requirement can be met at the point of interconnection, the person-to-person requirement cannot. Viewed at either point, the transaction is not within the terms of Section 1(c).[10]

b. There is no merit to Louisiana's claim (LA 21–22) that United's Purple System is exempt from Commission jurisdiction. Like the Green System, the Purple System receives substantial volumes of gas that are diverted from other United facilities carrying gas for ultimate out-of-state delivery (LPL App. A30, A42). Since the interstate gas is not received

[10] In *Federal Power Commission* v. *East Ohio Gas Co.*, 338 U.S. 464—the decision that the Hinshaw Amendment was designed to overcome—the situation was quite different. The company there received gas within Ohio from interstate pipelines and transported it for ultimate consumption within Ohio. All the gas it received at the point of interconnection was "from another person" and all was destined for consumption within the state.

"from another person," the Purple System is not exempt under Section 1(c).

The Purple System is disqualified for another reason. Even putting aside the interstate gas received from other United facilities and looking only to the gas received within Louisiana from other companies (*id.* at A 41–A 42), the system cannot qualify because not "all the natural gas so received is ultimately consumed within such State" (Section 1(c), 15 U.S.C. 717(c)). The Commission found that substantial volumes of gas *leave* the Purple System and are delivered to an interstate pipeline "for transportation out of the State of Louisiana" (LPL App. A 42). The court of appeals sustained that finding. It stated that "[g]as clearly flows out of this system for interstate markets" (*id.* at A 30).[11]

[11] Although the court of appeals did not reach the issue, we note that there is still another reason why neither the Green nor the Purple System is exempt. Louisiana's constitution (see LPL App. A 53, n. 8) precludes the State Public Service Commission from regulating "any aspect of sales of natural gas direct to industrial users for fuel or for utilization in any manufacturing process * * *." Thus, neither of United's systems qualifies for an exemption, because in neither system are "the rates and service" provided through the system "subject to regulation by a State commission" (Section 1(c), 15 U.S.C. 717(c)). The Federal Power Commission, by contrast, does have regulatory authority over the service of gas to direct customers (see p. 6, n. 4, *supra*). The Commission therefore properly concluded that "an exemption would not be available, even to a separate pipeline company" in Louisiana (LPL App. A 54).

CONCLUSION

For the foregoing reasons, the petitions for writs of certiorari should be denied.

Respectfully submitted.

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APRIL 1974.

U.S. GOVERNMENT PRINTING OFFICE: 1974